

CANADA / JUDGMENT

Riley v. Ritsco

2017 BCSC 925

COURT

Supreme Court of British Columbia

DECIDED

5 June 2017

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2017 BCSC 925 Riley v. Ritsco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Riley v. Ritsco,

2017 BCSC 925

Date: 20170605

Docket: M155797

Registry: New Westminster

Between:

Leo John Riley

Plaintiff

And

Paul Ritsco and Carol Ann Tones

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for the Plaintiff:

B. Findlay

M. Sandor

Appearing on his own behalf:

Paul Ritsco

Counsel for the Defendant, Carol Ann Tones:

K. Chiarot

Counsel for the Third Party:

K. McKey

Place and Date of Trial:

New Westminster, B.C.

February 6-10, 2017

Place and Date of Judgment:

New Westminster, B.C.

June 5, 2017

Introduction

- [1] The plaintiff is seeking damages in relation to injuries that he sustained in a motor vehicle accident.
- [2] The quantum of damages and apportionment of liability between the defendants are both in issue.

The Accident

- [3] At about 7:30 p.m. on October 28, 2011, at the intersection of Lougheed Highway and 216th Street in Maple Ridge, British Columbia, a vehicle driven by the defendant, Ms. Tones, collided with a vehicle driven by the defendant, Mr. Ritsco. The plaintiff was a passenger in Ms. Tones' vehicle.
- [4] Prior to the collision, Ms. Tones' vehicle was travelling eastbound on Lougheed Highway. She testified that, approaching the intersection at 216th Street, the speed of her vehicle was between 60 and 70 km/h. Her passenger, the plaintiff, testified that she was travelling between 70 and 80 km/h. He said that was the typical speed of the traffic on that part of the Highway even though the posted speed limit is 60 kph. I accept the evidence of Mr. Riley and find that Ms. Tones' vehicle was travelling at a speed that was between 70 and 80 km/h.

- [5] Mr. Ritsco testified that he was travelling westbound on the Lougheed Highway and entered the left turn lane intending to turn south onto 216th Street. He said that the traffic light was green and he was travelling about 20 kph when he initiated a left turn. He had seen the headlights of two cars travelling eastbound towards him but believed that he had enough time to complete a left turn. He said that he was in the middle of his turn when an oncoming car hit his and there was nothing that he could do to avoid the collision.
- [6] Mr. Ritsco testified that before the collision he had been at a casino where he said he consumed two bottles of beer. He then had lunch but no alcoholic beverages and was on his way home when the accident occurred. He was taken to the hospital because he complained of a sore neck. A sample of his blood was taken at the hospital and a police officer issued him a license suspension. The results of the blood test were not admitted into evidence.
- [7] In cross-examination, Ms. Tones said that she saw the other vehicle enter the left turn lane when she was about 100 feet away from it. She says that when the other vehicle initiated a left turn she was couple of car lengths away and assumed that it would stop. She said that she then applied the brakes of her vehicle but could not avoid hitting the other vehicle. It does not appear that she slowed down as she approached the intersection after seeing the other vehicle in the left turn lane. The front right of her vehicle collided with the rear passenger door of Mr. Ritsco's vehicle.
- [8] Both front airbags of Ms. Tones' vehicle deployed. She described the plaintiff as slumping and appearing to be unconscious for a short period of time. She was not injured and exited her vehicle. The plaintiff left the vehicle shortly thereafter. It is not clear whether he needed assistance to exit the vehicle. Ms. Tones said that the plaintiff appeared confused about how the accident had occurred and was bleeding from his lip. Emergency services arrived at the scene and determined that he did not require any medical assistance.
- [9] Mr. Ritsco exited his vehicle to see if anyone was injured and had a brief conversation with Ms. Tones. She said that she smelled alcohol on his breath and informed the authorities who had arrived at the scene.
- [10] The plaintiff and Ms. Tones were picked up by friends and taken to their home before returning to their respective residences.

The Plaintiff's Background

- [11] The plaintiff was born on May 5, 1949. At the time of trial he was 67 years of age. At the time of the accident he was 62. He was divorced nineteen years ago and has two children and two grandchildren.
- [12] He graduated from high school in 1966. Since then he has been qualified in various trades including millwrighting, heavy duty mechanics, gas and propane fitting and as a locksmith.

[13] After being employed as a millwright with various companies in B.C. he became a millwright for School District 42 in Maple Ridge in 1991. He was employed there when the accident occurred and retired on February 26, 2016, about 4 years and 4 months after the accident.

[14] He resides on his own at a mobile home co-operative in Pitt Meadows.

Plaintiff's Pre-Accident Condition

[15] The plaintiff testified that before the accident he was in good condition and had no health concerns.

[16] He injured his left knee in 2010 while working and also had an operation on his right hand in that year to relieve a condition known as Dupuytren's. He has not suffered any lasting effects from the knee injury nor the operation on his hand except some slight tingling in a finger on that hand.

[17] Prior to the accident, the plaintiff testified that he participated in a number of amateur sports including racquetball, tennis, swimming, golf and darts. He said that he would golf two or three times a week and usually scored in the eighties. He said that he played racquetball once a week and occasionally twice and described himself as a good player.

[18] He played in a darts league in Maple Ridge and continued playing darts in that league after the accident and until 2014. He would play two or three times a week. He generally played darts at a Canadian Legion or a bar.

[19] In the two or three years before the accident the plaintiff said that he would swim to keep in good physical condition. There is a forty foot swimming pool at the mobile home co-op where he lives and he said that he would swim about 100 lengths two or three times a week.

[20] Before the accident, the plaintiff said that he also jogged once or twice a month for about 1.5 kilometers.

[21] The plaintiff described himself as "quite social" before the accident. He spent time socially with groups of friends who would get together each week at the Legion to play darts. He mentioned that he had spent the evening with one such group during the trial to watch the Superbowl.

[22] Prior to the accident the plaintiff says that he kept his trailer clean. About 6 or 8 months before the accident he started some remodeling of his trailer but has not finished it.

[23] His duties as a millwright included the maintenance of shop equipment such as lathes, planers and joiners. He said that the physical demands of his work varied with the nature of the work that he did. He described his job with the school district as a premium job for a millwright in contrast to work as a millwright in heavy industry. Surprisingly, he said that he could work for weeks on end without getting his hands dirty.

- [24] He testified that before the accident he did not have any limitations in performing his job with the school district. He said that he enjoyed his job immensely and it was an important part of his lifestyle. He said that he did not have any plans to retire and indeed said he never thought about retirement except when he attended a few retirement seminars. At those seminars, he learned that his pension would not be enough to support the standard of living that he desired. He testified that his goal was to work until he was 71 or 72 at which time his pension would be maximized.

Plaintiff's Post - Accident Condition

- [25] After the accident, the plaintiff's condition was checked at the scene by a firefighter. Other than a cut on his lip, he was told that he was okay. He was picked up at the scene by friends and went to their home.
- [26] The day after the accident the plaintiff went to a medical clinic in Pitt Meadows. He testified that he was experiencing a headache, sore neck and pain in his upper and lower back, and his left shoulder. He says that he had not slept well after the accident. He was prescribed some pain medication including Tylenol 3's and returned to his home.
- [27] He underwent physiotherapy two or three times a week until May 2013. He also had massage therapy about once a week until February 2013.
- [28] He was referred for a cat scan, x-rays and MRI but no acute abnormalities were found. Some mild arthritis was found in his left shoulder and mild degenerative changes were found in his neck. The MRI of his right shoulder showed a subtle abnormality suggestive of a posterior superior labral tear. He was also diagnosed with adhesive capsulitis in his left shoulder.
- [29] The plaintiff testified that his condition after the accident led somewhat to a curtailment of his social life although he continued playing darts because he did not want to let his dart team down. He still swims once a week. He returned to play golf by July 2013 but says that he does not play as well since the accident.
- [30] The plaintiff's witnesses tended to confirm his evidence that his activity level has declined since the accident. His witness also noted that he appeared to be experiencing pain in his neck and shoulders from time to time.
- [31] He testified that he experiences headaches every day and takes Tylenol 3 when necessary. He says that his upper back and neck continue to bother him.
- [32] He testified that he was not able to do house cleaning as he had before the accident. It was pointed out however that in his examination for discovery he said that after the accident he had no limitations in relation to cooking or cleaning his home and doing yard maintenance. In light of the medical evidence I find that his answer at his examination for discovery is more accurate than at trial.

- [33] As a result of his injuries the parties agree that the plaintiff did not work from October 31, 2011 through to November 19, 2012, when he worked on a trial basis for two weeks. On January 7, 2013, the plaintiff commenced a gradual return to work program and worked three days per week, four hours per day for a total of 12 hours per week. His working hours increased to 20 hours per week on April 1, 2013 and then to 30 hours per week on April 22, 2013. He returned to full time work at 40 hours per week on May 6, 2013.
- [34] From the date of the accident until May 6, 2013, the plaintiff's gross wage loss totaled \$84,351.28. From October 31, 2011 until February 24, 2012, the plaintiff used 85 of his paid sick days for which he was paid \$19,536.40. On February 26, 2012, the plaintiff began receiving long-term disability benefits from Desjardin Financial Security. Such benefits totaled \$32,956.82 which he is contractually obliged to repay from any proceeds received as a result of this judgment.
- [35] While the plaintiff was receiving long term disability benefits, his employer did not contribute to his pension which would otherwise have been 9.4% of his earnings during that period of time.
- [36] The parties have agreed that a 15% deduction for income tax is appropriate in respect of the amount of his past wage loss but there is disagreement as to whether such a deduction should be made in respect to his sick leave and disability benefits.
- [37] The maintenance manager for the plaintiff's employer, James Pasquill, testified. He described the plaintiff as a conscientious employee and said that he had no concerns about his performance. He noted that after he returned to work on a full time basis he had some difficulties with work requiring him to do things above his head and lifting heavy objects. He often needed someone to help him with heavier lifting jobs. He was of the view that the plaintiff was less effective at his job than before the accident. He never discussed accommodations that could have been made for the plaintiff at work because he needed a full-time millwright. One of the two millwright positions had been eliminated for budget reasons.
- [38] Mr. Pasquill said that the plaintiff never requested any change in his duties. He said that while someone could assist him with his duties they could not be assigned to someone else. Nevertheless, he said that he would have allowed the plaintiff to continue working as long as he wanted. He never saw any need for the plaintiff to retire or stop working.
- [39] The manager of human resources with the plaintiff's employer, Angela Chung, testified. She knew of the plaintiff and was aware that he had been in a motor vehicle accident. She said that under the collective agreement in place between the employer and employees like the plaintiff, the employer had a duty to accommodate the plaintiff because of his injuries. She was not asked by the plaintiff or anyone else if any accommodations could be made for the plaintiff.
- [40] The plaintiff voluntarily retired from his employment on February 26, 2016.

Expert Report

[41] An expert medical report by Dr. Mark Adrian, a specialist in physical medicine and rehabilitation, was tendered and marked as Exhibit 2 in these proceedings.

[42] In summary, Dr. Adrian opined as follows:

1. The mechanical neck, mid and lower back pain experienced by the plaintiff are consistent with suffering an injury to the spinal tissue and are causally related to the motor vehicle accident.
2. The headaches experienced by the plaintiff are triggered by neck pain and related to his neck injury.
3. The plaintiff's left shoulder pain symptoms are causally related to the accident.
4. The plaintiff's left knee pain symptoms are causally related to the accident.
5. While the plaintiff experiences psychological and cognitive symptoms, Dr. Adrian deferred to specialists in psychiatry to comment on the nature of those symptoms.
6. As several years have passed since the accident, the prognosis for further recovery from the injuries suffered in the accident into the future is poor.
7. The plaintiff will probably continue to experience difficulty performing activities that place physical forces onto his neck, back, left shoulder and left knee. He will probably continue to experience difficulty performing employment, recreational and household activities involving prolonged sitting, standing or walking, awkward spinal positioning, heavy or repetitive lifting, stooping, repetitive neck motion, repetitive reaching, climbing or jarring activities.
8. The plaintiff's physical limitations are unlikely to improve into the future and he is permanently partially disabled due to injuries suffered in the accident.

[43] The plaintiff has undergone a variety of treatments for his injuries following the accident including 134 physiotherapy treatments, 64 massages, acupuncture and chiropractic treatments. This has given him some relief but the pain symptoms referred to by Dr. Adrian continue.

[44] There is no expert evidence that the plaintiff suffered a concussion.

Analysis

Liability

[45] The issue is the allocation of liability between Ms. Tones and Mr. Ritsco.

- [46] Mr. Ritsco testified that as he approached the intersection of Lougheed Highway and 216th Street he saw other vehicles approaching from the opposite direction about a quarter of a block away. He said that he entered the dedicated left turn lane travelling about 40 km/h and kept moving because the light was green. As he entered the intersection he said that he slowed to about 20 km/h. He did not come to a full stop but continued into a left hand turn when the other vehicle collided with his. He said he was unable to do anything to avoid the collision.
- [47] Ms. Tones testified that immediately before the collision her vehicle was approaching the intersection at a speed of 60 to 70 km/h. As indicated, I have accepted Mr. Riley's evidence that she was travelling between 70 and 80 km/h as she approached the intersection. While that is greater than the posted speed the evidence is that that is the speed at which vehicles at that location generally travel. It was nighttime and there was drizzly rain. About 100 feet away she noticed the other vehicle in the dedicated left turn lane but noted that the traffic light was green for her direction of travel.
- [48] Ms. Tones estimated that she was about 15 feet from the intersection when Mr. Ritsco's vehicle turned in front of her vehicle. She then slammed on her brakes. She said there was nothing else she could do to avoid the collision.
- [49] Section 174 of the Motor Vehicle Act, R.S.B.C. 1996 c. 318 (the "Act"), provides:
174. When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.
- [50] Section 127(1) of the Act provides:
- 127(1) When a green light alone is exhibited at an intersection by a traffic control signal,
- (a) the driver of a vehicle facing the green light
 - (i) may cause the vehicle to proceed straight through the intersection, or to turn left or right, subject to a sign or signal prohibiting a left or right turn, or both, or designating the turning movement permitted,
 - (ii) must yield the right of way to pedestrians lawfully in the intersection or in an adjacent crosswalk at the time the green light is exhibited, and
 - (iii) must yield the right of way to vehicles lawfully in the intersection at the time the green light became exhibited.

- [51] In *Pacheco (Guardian ad litem of) v. Robinson*, (1993), 75 BCLR (2d) 273, the Court of Appeal commented on the obligations of a driver who wishes to make a left hand turn at an intersection, at para. 15:
15. In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the defendant, as here, has totally failed to determine whether a turn can be made safely, the defendant should be held 100 percent at fault for a collision which occurs.
- [52] In my view, Ms. Tones entered the intersection lawfully, facing a green light, and after she became aware of Mr. Ritsco's vehicle in the dedicated left turn lane facing her. However, I find that Mr. Ritsco proceeded from the left turn lane continuously into a left turn in front of Ms. Tones' vehicle having failed to determine whether he could do so safely. When Mr. Ritsco turned his vehicle in front of Ms. Tones' vehicle she slammed on her brakes but was unable to avoid the collision. The fact that Ms. Tones had noticed Mr. Ritsco's vehicle in the left turn lane before he initiated a left turn and did not reduce the speed of her vehicle does not constitute negligence. The presence of Mr. Ritsco's vehicle in the left turn lane did not cast a duty on her to take extra care and she was entitled to presume that Mr. Ritsco would not initiate a turn until her vehicle was through the intersection.
- [53] Ms. Tones' vehicle constituted an immediate hazard to Mr. Ritsco's vehicle and he was required to yield the right of way to her. He was negligent in failing to do so. Ms. Tones was unable to avoid the collision with Mr. Ritsco's vehicle.
- [54] In the circumstances I find that Mr. Ritsco is 100% at fault for the collision.

Damages

Non-Pecuniary Damages

- [55] The purpose of non-pecuniary damages was described in *Smusz v. Wolfe Chevrolet Ltd.*, 2010 BCSC 82, by Russell J:
- [85] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; and *Kuskis v. Tin*, 2008 BCSC 862 [Kuskis]. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis*, at para. 136.

[86] There are a number of factors that courts must take into account when assessing this type of claim. Madam Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54).

[56] The plaintiff cited the following cases in support of his claim for non-pecuniary damages in the range of \$120,000 to \$130,000: *Stapley v. Hejslet*, 2006 BCCA 34; *Foran v. Nguyen et al*, 2006 BCSC 605; *MacDonald v. Joseph*, 2015 BCSC 1461; *Hu v. Tan*, 2016 BCSC 908; *Severud v. Smit*, 2016 BCSC 1021; *Knauf v. Chao*, 2009 BCCA 605 and *Morlan v. Barrett*, 2012 BCCA 66.

[57] I accept Dr. Adrian's description of the injuries suffered by the plaintiff as a result of the collision. It appears that the plaintiff has endured pain of different levels and at different times during the years following the accident. He was totally disabled from work for about 14 months and he will likely continue to experience some pain in the areas of his body where he was injured for the remainder of his life. He is described by Dr. Adrian as suffering a permanent partial disability as a result of the accident. His injuries have negatively affected his ability to work as a millwright as well as a number of his recreational activities.

[58] Without expert evidence in the field of psychiatry or psychology, I am unable to conclude that his emotional or mental state was adversely affected by the accident or whether the changes in his social life resulted from the accident.

- [59] I have considered the circumstances in the cases referred to which differ in some respects from the case at bar. I found the decision by Madam Justice Duncan in *Mandra v. Lu*, 2014 BCSC 2199 to be particularly helpful in arriving at an appropriate award for non-pecuniary damages in this case.
- [60] Duncan J. describes the plaintiff's circumstances at para. 121:
- [121] Mr. Mandra was 53 years of age when the accident occurred. He was transformed from a happy, healthy and hardworking man to one who lives in constant chronic pain. His lower, mid and upper back hurt on an ongoing basis. He has neck pain, headaches and pain in his legs. He is nervous, forgetful, miserable and depressed. Treatment and medication have not helped and there is no prognosis for improvement except as described by Dr. Helper and only in relation to his lumbar pain. Compendiously his pain is severe and chronic and disables him from the type of work he used to do. He was formerly employed as a millwright, a heavy duty job, but now has a hard time sitting or standing for prolonged periods and lacks the necessary physicality to work as he once did. The injuries render him unemployable in his past career as a millwright and only very marginally employable in lighter occupations, particularly given his challenges with English. The injuries have affected his social life and his relationship with his wife. He is not as active as he once was. He has suffered psychologically.
- [61] There are some factual differences between Mandra and Mr. Riley's circumstances. Mr. Mandra's injuries rendered him unemployable as a millwright while in the case at bar the plaintiff was able to work on a full time basis until he returned and, based on the evidence of Mr. Pasquil, longer if he wished. Mr. Pasquil said that he was prepared to accommodate the plaintiff so that he could continue working and he would provide the plaintiff with assistance from time to time for heavier jobs.
- [62] While Dr. Adrian opines that the plaintiff would find certain functions at work to be difficult he did not say that the plaintiff was unemployable. There is also insufficient evidence, and none from an expert, to establish that the plaintiff suffered psychological damage from the accident. Indeed, Dr. Adrian defers to specialists such as a psychiatrist regarding the nature of the plaintiff's psychological state.
- [63] Unlike Mr. Mandra, the plaintiff in the case at bar did not present evidence from an occupational therapist or a psychiatrist.
- [64] Considering the factors referred to in *Stapley v. Hejslet* and the particular circumstances of the plaintiff I have concluded that an award of \$65,000 is appropriate for non-pecuniary damages.

Past Income Loss

- [65] It is agreed that the plaintiff's gross past wage loss from the date of the accident through to May 6, 2013 (when he resumed full-time work) is \$84,351.28. That amount includes sick leave benefits from his employer of \$19,536.40 resulting from the plaintiff using sick leave credits available to him as well as disability benefits from an insurer known as Desjardin Financial Security of \$32,956.82.
- [66] The parties agree that the plaintiff is contractually obligated to repay the full amount of \$32,956.82 to Desjardins without deduction from the proceeds of a judgment.
- [67] The parties disagree as to whether or not a 15% deduction should apply to the sick leave amount and the disability benefit.
- [68] In my view, the 15% deduction should apply to the plaintiff's sick leave entitlement so that he is not over compensated because he would be subject to tax on any amounts paid to him in lieu of sick leave benefits.
- [69] However, the amount equal to his disability benefits should not be subject to a 15% reduction for tax as he will be required to pay the gross amount received to Desjardins without any deduction. In this regard, the third party may require the plaintiff to provide it with a written direction to pay that portion of the damages awarded to Desjardins.
- [70] The resulting net income loss for that period is \$76,642.11
- [71] With regard to the lost wages claimed by the plaintiff from May 6, 2013 until February 26, 2016 (his date of retirement), I accept that he used his sick bank for 14 days of work that he lost due to his injuries from the accident. The amount awarded for that period will be his net income loss of \$2,869.09.
- [72] The total past income loss is \$79,511.20.

Loss of Earning Capacity

- [73] The plaintiff claims income lost by him from February 26, 2016 until the date the trial ended and the loss of income that he anticipated earning from the end of the trial until the day that the plaintiff reaches age 71.6 when he would have maximized his pension benefits and says he would have retired.
- [74] This claim depends upon whether the court determines that the plaintiff's decision to retire was because of the injuries that he sustained in the accident.
- [75] As in the case, *Barr v. Accurate Transmission and Driveline*, 2016 BCSC 2432, in order to recover damages in this category, the court must find that the injuries sustained by the plaintiff and in the effect upon him made it necessary for him to retire because they prevented him from safely and competently doing his job. The onus of proving that on a balance of probabilities is on the plaintiff. (See para. 46)

- [76] The evidence satisfies me that the plaintiff experienced some difficulties in performing the tasks associated with his work but the plaintiff has not established on a balance of probabilities that but for the injuries sustained in the accident he would have continued to work after February 26, 2016.
- [77] The plaintiff's work history after the accident is informative. The accident was in October 2011. The plaintiff returned to work on a graduated program in January 2013 and then on a full time basis on May 6, 2013. At that time Dr. Sommi cleared the plaintiff to return to work on a full time basis. He then worked full time for almost 3 years before deciding to retire. At that time he was 66 years of age and soon to turn 67. During the period that he worked on a full time basis, the plaintiff only missed 14 days and 1 hour of work because of his injuries. The plaintiff did not explain how he had managed to work on a full time basis for almost 3 years while only missing 14 days of work because of his injuries.
- [78] Before he decided to retire, the plaintiff did not request any formal accommodation from his employer because of the difficulties he had performing some tasks. The evidence of Ms. Chung indicates that accommodations may have been available and the human resources department would have tried to assist the plaintiff. She said that the collective agreement governing the relationship between employees, like the plaintiff, and the school district provides that the employer had a duty to accommodate an injured employee.
- [79] The testimony of the plaintiff's supervisor, James Pasquill, indicated that he was aware of the limitations that the plaintiff experienced on the job and he had always been willing to provide him with assistance if needed. He said that the plaintiff never requested any change in his duties. He told that plaintiff that if he was ever in pain he was free to go home. Importantly, Mr. Pasquill said that he was prepared to accommodate the plaintiff so that he could continue to work as long as he wanted. He said that he never saw any need for the plaintiff to retire or stop working.
- [80] As in Barr, I take no issue with the plaintiff's truthfulness. However, I am concerned that for his own subjective reasons, the plaintiff has "imposed upon the matter some unconscious distortion." (para. 51) Thus, while the plaintiff said that he retired because of the effect of his injuries on his ability to safely perform his work, he took no steps to determine if his employer would accommodate his partial disability so that he could work for a longer period of time. I accept that the difficulties he had in performing some of his duties affected his interest in continuing to work but in my view his subjective view of his condition is not sufficient to discharge the onus of establishing that he would not have retired except for the injuries that he sustained in the accident.

Cost of Future Care

- [81] Lacking in this case is an evidentiary link between a medical assessment of the plaintiff's condition and the resulting ongoing needs for his care. (Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144) Since he was discharged from chiropractic care on May

23, 2013, the plaintiff has not sought any formal treatment for his injuries. Dr. Sommi did not provided evidence regarding any future care needs that the plaintiff might have. Dr. Adrian recommended that the plaintiff continue with an exercise program and said he might benefit from taking nortriptyline medication. Those recommendations were made in March 2016 however the plaintiff has not followed them.

[82] The evidence does not establish that the plaintiff is entitled to any amount for the cost of future care.

Loss of Housekeeping Capacity

[83] The evidence does not satisfy me that the plaintiff requires assistance with housekeeping tasks beyond those that he is capable of performing.

Special Damages

[84] The parties are in agreement that the plaintiff is entitled to an award of \$8,698 for special damages.

Summary of Damages Awarded

[85] Damages are awarded as follows:

- a) Non-pecuniary: \$65,000.00
- b) Past income loss: \$79,511.20
- c) Special damages: \$8,698.00
- d) Total: \$153,209.20

"Bowden, J."

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